Nos. 53, 71, 139, 155, 156 and 157

Brief of Stockslager & Heard for Appellants.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1901.

Filed Mar 21, 1902.

A. W. CORBUS, *Appellant*, *vs.* THE ALASKA TREADWELL GOLD MINING COMPANY.	No. 53.
CHARLES STEWART, *Appellant*, *vs.* THE WASHINGTON AND ALASKA SEAMSHIP COMPANY *et al.*	No. 71.
THE PACIFIC STEAM WHALING COMPANY, *Appellant*, *vs.* THE UNITED STATES.	No. 139.
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Appeals from the United States District Court for the District of Alaska.

Brief for Appellants in Nos. 71, 139, 155, 156, and 157.

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ROBERT Y. HILLIARD PRINTING CO

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STATEMENT.

On motion of the appellants in Nos. 71, 139, 155, 156, and 157, this Court advanced said causes under paragraph 8, rule 9, and set them down for hearing with cause numbered 53 on the docket for the October Term, 1901, the principal question in each case being the constitutionality of sections 460 and 461, of chapter 44, of the Act of Congress of March 3, 1899, entitled "An act to define and punish crimes in the District of Alaska and to provide a code of criminal procedure for said District."

In the case of A. W. Corbus *vs.* The Alaska Treadwell Gold Mining Company, No. 53, Corbus, a stockholder in said company, filed a bill in equity asking that the officers of the company be enjoined from paying a license tax of $3 per stamp upon the stamp mill owned and operated by said company, and asking that the sum of $1,875 paid into the court be held to await the final determination of the question of the constitutionality of sections 460 and 461 of the Act of March 3, 1899, which sections, it was claimed, are unconstitutional and void. A temporary restraining order was granted, but upon final hearing the demurrer of the appellee company was sustained. Final decree was entered and appeal taken.

The appellant Corbus appears by other counsel.

The Record shows that in case No. 71, Charles Stewart *vs.* The Alaska Steamship Company and Frederick Dodwell, treasurer, and H. C. Wallace, president, of said company, the appellant, a stockholder in said company, on the 7th day of Novem-

ber, 1899, filed in the office of the clerk of said court a bill in equity asking that the defendants be enjoined from paying out or applying the sum of $767 or any money of said company for license tax under the provisions of said section 460, of chapter 44, of the Act of Congress of March 3, 1899, for and on behalf of the steamship "City of Seattle," which he, said appellant, had forbidden, but which he alleged the said officers were determined to and would do unless restrained.

The appellant offered to and did deposit with the clerk of said court the said sum of $767, the amount claimed as such tax, which he asked might be held by the court to abide the decision of this Court upon the question of the constitutionality of said Act of Congress. (Record, pp. 1 to 7.)

Afterwards, on said 7th day of November, 1899, said court granted a restraining order restraining defendants from paying said license tax, and directing that they be permitted to pay the sum into the registry of the court pending the hearing and final determination of the rights of the parties, and that license issue the same as if it had been paid upon the application of the company, and also directed that a copy be served on the United States district attorney for Alaska and that he be given leave to appear in behalf of the United States. (Record, pp. 7 and 8.)

A demurrer to the bill was filed by the defendants for want of equity therein.

Afterwards, to wit, on the 30th day of December, 1899, the said cause coming on for final hearing, the United States district attorney asked and

obtained leave of the court to appear as *amicus curiæ*, and in that capacity and disclaiming any intention to in any manner represent or bind the United States, denied that the court had any jurisdiction under any of the forms of action presented to hear and determine the cases upon their merits. He denied the right or power of the court to enjoin the defendants in any case from paying the license in question, arguing in support of the constitutionality of the law, and filed a brief in support of both contentions. Whereupon the demurrer of the defendants was sustained by the court. (Record, pp. 9 to 16.)

Afterwards, on January 2, 1900, the court entered a decree directing the issuing of license and the payment into the Treasury of the United States of the money deposited in court. (Record, pp. 16 and 17.)

Appeal was prayed from such decree to this court, bond duly filed, bill of exceptions allowed, and appeal granted.

In the case of The Pacific Steam Whaling Company *vs.* The United States, No. 139, a petition was filed in the court setting forth the fact that the company owned and operated the steamships "Walcott," "Excelsior," "Newport," and "Golden Gate," American vessels registered at the home port of San Francisco, Cal., which were engaged in carrying freight and passengers between the different ports in Alaska, and no other, protesting against the payment of any additional license tax under the said Act of March 3, 1899, on account of said steamships; but because of the severe penalties

provided by the said act, and in order to avoid prosecution thereunder, asked the action of the court in the premises. The company also deposited in court, under protest, the sum of $779.80, being $1 per ton on the net tonnage of said vessels, which it asked might be held pending the determination of the questions involved.

It was also represented that the company carried on the business of salmon canneries at Hunter's Bay, Orca, Kenai, Uyak Bay, Chignik, and Nash-ag-ak, in said District of Alaska. It protested against the payment of any part of the 4 cents per case of salmon canned by it, as required by said section 460 of the Act of March 3, 1899, but offered to and did pay into court the amount required, the same to be held until the final determination of the matter.

Whereupon the court ordered that the company be permitted to carry on its several kinds of business and that the clerk hold the money paid into court by it, viz., $779.88 on account of said steamships and the sum of $3,922.56 on account of said salmon canneries, which sum it was directed be held until the determination of the matters set forth in the petition.

On the 30th day of December, 1899, the court overruled and denied said protest, holding the company liable to pay the said license tax and directing that the money paid into the court by the company be covered into the Treasury of the United States.

January 2, 1900, final decree was entered in said

cause, to which exception was made by the petitioner and allowed by the court.

Appeal was prayed and granted, bill of exceptions allowed, bond filed, and the record transmitted to this Court.

In cases Nos. 155, 156, and 157, the Pacific Coast Steamship Company *vs.* The United States, petitions and protests were filed similar to those in No. 139; that in No. 155 being on account of the steamship "Orizaba," in which case the license tax exacted was $742.69; in case numbered 156, on account of the steamship "City of Topeka," the tax for which was $746.62, and in case numbered 157, on account of the steamship "Queen," the tax for which was $1,672.15.

These vessels, it was alleged, were employed by the company in the transportation of freight and passengers from the port of Seattle and other ports on Puget Sound and the port of Victoria, B. C., to ports in Alaska. The chief and almost entire business transacted by them being through business in freight and passengers between said ports on Puget Sound and British Columbia on the one part and ports in Alaska on the other. And, incidentally, they did a local business in the District of Alaska, and some of them, particularly the "Queen," are operated at times as excursion steamers between Puget Sound ports and those in southeastern Alaska; that the local business done by said steamers while plying in Alaskan waters is very small.

It was insisted that no license was necessary, under said Act of Congress, for either of these vessels so used, but that to avoid the extremely stringent penalties of the said Act, the company makes its protest and prays the action of the court in the premises.

It is also stated that said steamships are duly enrolled, assessed, and taxed to their owners at the port of San Francisco, and are therefore not subject to the payment of additional license tax within the District of Alaska. And that if it be held they are so subject, under said Act of Congress, then the same is unconstitutional. (Record, pp. 1 to 4.)

The said several above-mentioned sums were paid into court under protest, to avoid the penalties of the law, and on the 6th day of July, 1899, the court directed that license issue to said steamships and that the money so paid be held until the final order and trial of the matters set forth in the petition and protest.

Afterwards, on the 30th day of December, 1899, the court ignored and rejected said protest and directed that license be issued to said steamships and that the money deposited be paid into the United States Treasury.

On January 2, 1900, final decree was rendered, overruling, denying, and ignoring each of said protests, and holding said steamships liable to said license tax and covering the money deposited therefor into the United States Treasury. (Record, pp. 5 to 13.)

Appeal to this court was prayed and granted, bill of exceptions allowed, bond filed, and the record duly certified.

Assignment of Errors.

(1) The court erred in holding the injunction prayed for by appellants would not lie.

(2) In holding the parties in these cases had a plain and adequate remedy at law.

(3) In holding that the parties were not entitled to equitable relief on the ground that a multiplicity of suits was threatened and that they were about to sustain irreparable injury.

(4) In holding that the court could not acquire jurisdiction to pass upon the constitutionality of the Act of March 3, 1899, upon the protests filed.

(5) In not holding that the said Act violates the provisions of the Constitution of the United States and is, for that reason, null and void.

(6) In not granting the injunction and sustaining the protests of the said appellants.

(7) In rendering final judgment and entering final decree against appellants in said proceedings.

(8) In not holding the monies deposited in court until the final determination by this court of the questions involved.

In case numbered 139, Charles Stewart *vs.* The Washington and Alaska Steamship Company *et al.*, the appellant assigns the following separate and additional errors:

(9) The court erred in sustaining the demurrer filed by the defendants to appellant's bill praying for an injunction.

(10) In entering final decree against appellant on said demurrer.

(11) In not holding that as said steamship was duly enrolled and licensed in the State of Washington, the said Act of March 3, 1899, did not apply to her.

In cases numbered 155, 156, and 157 The Pacific Coast Steamship Company *vs.* The United States, the said appellant assigns the following separate and additional errors:

(12) The court erred in holding that the said steamships of appellant, which were duly enrolled, licensed, and taxed at the home port of San Francisco, Cal., and engaged in the coastwise trade, their principal business being through business between Puget Sound and British Columbia ports and the ports of Alaska, and merely incidentally doing a local business, are, under the Act of March 3, 1899, subject to the additional license tax prescribed therein.

(13) In not holding said steamships are not "plying in Alaskan waters" within the meaning of said Act of March 3, 1899, and therefore do not come within its provisions.

Argument.

The first question presented by the Record for consideration by the court is that of the sufficiency of the bills filed by appellants to enjoin the payment of the license required by the Act of March 3, 1899, as a prerequisite to the carrying on of the business in which they were engaged.

The court sustained demurrers to these bills and in the opinion given stated, in effect, that injunction by one stockholder against a corporation to restrain the latter from applying for a license and paying the tax imposed by a law of Congress for conducting a business, would not lie.

(2) That equity would not interfere because the parties had a plain legal remedy.

(3) The facts are not so pleaded as to enable the court to "reasonably infer" that the allegation as to the threatening of a multiplicity of suits is true.

We will consider these objections in their order, and, *first*, as to the right of a stockholder to prevent, by injunction, the wasting of the funds of the corporation by the payment by the officers of the company of an illegal tax.

The court concedes that this Court held in the case of Pollock *vs.* Farmers' Loan and Trust Company (157 U. S., 429), on review (158 U. S., 601), that a stockholder in that company could invoke the aid of a court of equity to enjoin the company

from paying the income tax. But he attempts to draw a distinction between that case and those at bar.

The difference between the cases, he states, is, that the trust company had from time to time taken and executed and was holding and executing numerous trusts, and that voluntary compliance with the income tax provisions would expose the company to a multiplicity of suits, while in the cases at bar the appellants are corporations formed for the simple purpose of operating steamers in Alaskan waters, and that it is not claimed any trusts have been committed to the defendants, their only obligation being to their stockholders.

We are unable to perceive the difference in principle, between the two classes of cases, contended for by the court.

If the officers of the steamship companies, whom it is sought to enjoin, hold the funds in their hands belonging to the company as *trustees for the stockholders*, we cannot see that their obligations would be any less than if they held trust funds of other persons, having no interest in the companies.

That they do hold such funds *in trust* will hardly be disputed. That the officers of a corporation occupy a fiduciary position towards both the stockholders and creditors of the corporation is well settled.

Drury *vs.* Cross, 74 U. S. (7 Wall.), 302; R. R. Co. *vs.* Howard, 74 U. S. (7 Wall.), 392.

In the well-considered case of Dodge *vs.* Woolsey, 59 U. S. (18 How.), 331, which was a suit in chancery brought by Woolsey in the circuit court of the

United States for the district of Ohio, against the tax collector, the directors of the branch bank itself, seeking to enjoin the collection of a tax assessed by the State of Ohio on the bank, on the ground that it violated the Constitution of the United States. Mr. Justice Wayne, speaking for the court, after stating there had been some conflict in the decisions, said:

> "It is now no longer doubted, either in England or the United States that courts of equity in both have jurisdiction over corporations, at the instance of one or more of their members, to apply preventive remedies by injunction, to restrain those who administer them from doing acts which would amount to a violation of charters, or to prevent any misapplication of their capitals or profits, which might result in lessening the dividends of stockholders, or the value of their shares, as either may be protected by the franchises of a corporation, if the acts intended to be done create what is in the law denominated a breach of trust. And the jurisdiction extends to inquire into and enjoin, as the case may require that to be done, any proceedings by individuals, in whatever character they may profess to act, if the subject of complaint is an imputed violation of a corporate franchise, or the denial of a right growing out of it, for which there is not an adequate remedy at law."
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> Cunliffe *vs.* Manchester & Bolton Canal Company, 1 Russ. & Mylne, ch. 131 n.; Ware *vs.* Grand Junction Water Co., 1 Russ. & Mylne, 136; Bagshaw *vs.* Eastern Counties Railway Co., 7 Hare, ch. 144; Angell & Ames, 4th ed., 424, and the other cases there cited.

In this case there were none of the elements which the trial court held distinguished the case of Pollock *vs.* The Farmers' Loan and Trust Co., *supra*, from the cases at bar. It was a case precisely in point, being a bill by a stockholder of a bank to enjoin the officers of the bank from paying an illegal tax, and did not involve any trust undertaken by the bank for outside parties. (See also High on Injunctions, 3d ed., secs. 1203 and 1225.)

The second point made by the court against the bills of appellants is that they have a plain remedy at law by resisting the enforcement of the statute in question.

There is no doubt the officers of these corporations could have resisted the enforcement of the law. But it is charged in the bills they refused to do this, and unless restrained they would pay the license in question. It cannot be contended, therefore, that the appellants had a plain legal remedy. They were driven to take the only course by which their rights and those of the other stockholders could be protected.

It is not strange, however, that these officers were not willing to voluntarily resist the enforcement of this law. It is a criminal statute, bristling all over with pains and penalties. Section 461 provides penalties for its violation as follows:

> "For the first offence a sum equal to the license; and for a second offence a sum equal to double the amount of the license; and for the third offence three times the license required and imprisonment for not less than thirty days nor more than six months: *Provided*, That

each day business is done or attempted to be done in violation of the preceding section shall constitute a separate and distinct offence."

Leaving out of view the matter of imprisonment, let us see the cost to these appellants of resisting this criminal statute:

The liability to fines by the Pacific Coast Steamship Company, for instance, would have been for the first day, $3,160.46; for the second day, $6,320.92; and for the third day, $9,481.38, or an aggregate of $18,962.76. And then a fine of $3,160.46 for each additional day they engaged in business, to be increased as above.

The very remarkable suggestion made by the court that under the law he had the power to somewhat mitigate the rigors of this terribly severe statute, and that it was well known to every attorney appearing in these cases that he had frequently exercised that power is without force, if for no other reason, because, even if they could have relied upon his leniency, no assurance could be given that he would occupy his position as such judge a single additional day.

After the third offense, as we have seen, the statute makes imprisonment a part of the penalty, and the court would have had no power to omit it entirely. And, as the business of the appellants is carried on constantly, a new offense would have been committed each day.

The language used by the court in the great case of Osborn *vs.* Bank of the United States, 22 U. S. (9 Wheat.), 738, speaking through Chief Justice

Marshall, that the "execution (of the statute) would violate and destroy the rights and privileges of the complainant," is applicable to the cases at bar.

But to exclude the jurisdiction of a court of equity the parties must have not only a "plain" remedy at law, but it must be adequate and complete as well.

As to the meaning of this language of the Act of 1789, this Court, in Boyce's Executors *vs.* Grundy (3 Pet., 210), said that the remedy at law must be "as practical and as efficient to the ends of justice and its prompt administration as the remedy in equity."

If it be less than this, then equity jurisdiction is not by this rule excluded from taking cognizance of the case. Watson *vs.* Sutherland, 5 Wall., 74; Morgan *vs.* Beloit, 7 Wall., 613; High on Injunction, 3d ed., sec. 496, and authorities cited.

The remedy at law suggested by the court in these cases certainly would not have been as plain, practical, or efficient to the ends of justice, as that pursued by the appellants, and we insist, therefore, that the objection to the jurisdiction on this ground cannot be sustained.

The third objection made by the court was that the facts are not sufficiently stated to enable the court to "reasonably infer" that the allegations as to a multiplicity of suits are true.

We hardly think this is a matter open to the inference of the court, but are of opinion that he must take the facts as stated and sworn to as true. Can the court disregard the statement of facts in

the bills, and as he contends, base his decision as to whether they exist upon such "reasonable inferences" as he may draw from them? It seems to us the mere statement of the position of the court is sufficient to show it is not tenable.

In the case of Dodge *vs.* Woolsey, *supra*, it was claimed in argument that the suit had been improperly brought in the circuit court of the United States, because it was a contrivance by Woolsey, or between him and the directors of the bank, to give the court jurisdiction on account of their residence and citizenship being in different States. In answer to this the court said:

> "We first remark as to the imputation of contrivance that it is the assertion of a fact which does not appear in the case; one which the defendants should have proved if they meant to rely upon it to abate or defeat the complainant's suit, and that, not having done so, as they might have attempted to do, we cannot presume its existence."

So we might say in the case at bar. The complainants stated the fact to be that a multiplicity of suits would result from the refusal of the court to grant the injunctions prayed for. This is clearly the statement of a fact, and would seem to be sufficient.

The Act of March 3, 1899.

Assuming that we have shown the court had jurisdiction to grant the injunctions prayed for, and that the facts stated were sufficient, we now

proceed to a discussion of the constitutionality of such act.

The appellants contend that said sections 460 and 461 of said act violates the provisions of the Constitution of the United States, particulary section 8, of article I, and section 9, of article I, of the said Constitution.

Section 8, of article I, provides that—

> "The Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States."

Section 9, of article I, provides that—

> "No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another; nor shall vessels bound to or from one State be obliged to enter, clear, or pay duties in another."

It will hardly be denied that the sections of the Act of March 3, 1899, in controversy, violate these provisions of the Constitution.

The tax exacted from the owners of these steamships and other classes of business is not "uniform throughout the United States." In point of fact they do not exist in their unusual, if not unreasonable, excessiveness at any other place in the United States, its Territories, or dependencies, so far as we are informed.

And as to the steamships which are owned, licensed, and taxed at their home ports in the

United States, the tax is certainly a discrimination against them by requiring the vessels bound from one State to another to pay duties—that is, if Alaska can be considered a State, or is included in the expression "throughout the United States," as they are used in the sections of the Constitution quoted.

This brings us to the discussion of the meaning of these provisions of the Constitution.

Since the recent decisions of this Court in the De Lima and Downes cases, we are no longer left in doubt as to the meaning of these provisions. It seems to be settled by these decisions that territory acquired by treaty, as Alaska was, becomes territory of the United States immediately upon the ratification of the treaty, but that such territory does not become a "State," or subject to the provision requiring taxation to be uniform "throughout the United States," until Congress extends the Constitution with these provisions to such territory. The inquiry arises, therefore, in these cases what Congress has done to extend the Constitution of the United States to Alaska.

The Treaty.

The treaty with Russia for Alaska was proclaimed by the United States June 20, 1867 (15 Stats., pp. 539 to 544).

Article III, on page 542, is as follows:

> "The inhabitants of the ceded territory, according to their choice, reserving their natural allegiance, may return to Russia within three years; but if they should prefer

to remain in the ceded territory, they, with the exception of uncivilized native tribes, shall be admitted to the enjoyment of all the rights, advantages, and immunities of citizens of the United States, and shall be maintained and protected in the free enjoyment of their liberty, property, and religion."

These guarantees of civil and religious liberty and protection to property are in precisely the same language as they are found in the Constitution of the United States.

The first action of Congress in reference to this acquired territory is the Act of July 27, 1868, now sections 1954 to 1976, Revised Statutes. The first section of this act, now section 1954, is as follows:

> "The laws of the United States relating to customs, commerce, and navigation are extended to and over all the mainland, islands, and waters of the territory ceded to the United States by the Emperor of Russia by treaty concluded at Washington on the thirtieth of March, anno Domini eighteen hundred and sixty-seven, so far as the same may be applicable thereto."

Then follows provisions restricting the importation of fire-arms and distilled spirits, prohibiting the killing of fur-bearing animals and giving jurisdiction in what is denominated by the act "the territory of Alaska and the waters thereof," to the district courts of the United States in California or Oregon or the district courts of Washington.

Provision was also made for reserving certain islands for Government purposes, and for making leases for the killing of seals.

Section 4140 Revised Statutes, which was originally a part of the same act, provides for nationalizing vessels owned by actual residents of Alaska, June 20, 1867. (The date of the treaty.)

The Act of May 17, 1884.

By this act Congress provided that said territory should constitute a civil and judicial district, making provision for its government, by the appointment of a governor, defining his powers and prescribing his duties; establishing a district court and fixing its jurisdiction, also for the appointment of a clerk, a district attorney, and a marshal.

Authority was given the President to appoint four commissioners who should have the powers of justice of the peace in Oregon, the laws of which state were declared to be the law of the district. Writs of error to the district court from the United States circuit court for the district of Oregon were provided for and appeals allowed to said court. The office of surveyor general of said district was also created, his duties prescribed, and the mineral land laws of the United States extended to said Territory and the rights of persons then in possession of land other than mineral land guaranteed, and provision for obtaining title by future legislation promised.

This act created an organized government for the district of Alaska. This Court has held that the *court* created by said act should be considered as the "Supreme Court of a Territory" within the meaning of the Act of March 3, 1891. Coquitlam *vs.* The United States, 163 U. S., 346.

It must be apparent also that the application to the territory composing this district, by said act, of the laws of the State of Oregon, which laws were enacted under and are subject to the Constitution of the United States, extended the Constitution to Alaska just as effectively as if it had been done by direct enactment.

Since the Act of 1884, Congress, by the Act of 1891, extended the townsite laws to the District and provided for the purchase of trade and manufacturing sites by persons engaged in trade or manufacturing within said Territory.

By the Act of May 14, 1898, the homestead laws were extended, as were also the act providing for acquiring the right of way by railroad companies over the public lands, the bankruptcy law, and the public land surveys.

The next in order of date is the Act of March 3, 1899, providing a complete criminal code for Alaska, sections 460 and 461 of which are in controversy in these cases. We have already discussed these provisions of the code.

By Act of June 6, 1900, a complete civil code was also provided. This act provides for the appointment of a governor, judges, district attorneys, a surveyor general, and a marshal by the President, by and with the advice and consent of the Senate, and fixes their tenure.

An oath to support the Constitution of the United States is also provided for the officers of the District.

It will be observed also that section 1891 Revised

Statutes extends all general laws of the United States to all the "organized territories."

In the Porto Rican cases it was clear Congress had done nothing looking to the extension of the revenue provision of the Constitution, or of the revenue laws, to that Territory, but, on the contrary, all its action indicated a different purpose.

In contrast with this action we have Congress by its first act (July 27, 1868) extending to Alaska "the laws of the United States relating to customs, commerce, and navigation." The same act provides for the nationalizing of the vessels owned at the date of the treaty by actual residents of the Territory. Here, then, we have an extension of all the laws of the United States enacted as they were in accordance with the Constitution, which affect the cases in controversy, without any exception whatever. It is also seen that when Congress extended the mineral laws, the homestead and the bankruptcy law to Alaska, the purpose to make the laws governing that Territory uniform with the laws throughout the United States, is clearly apparent.

We can hardly conceive that it was the purpose of Congress to subject these hardy pioneers of this rigorous northland to pains and penalities and burdensome taxes not born by the people in the other more favored localities. If these taxes were to be expended locally to build up a school system and to supply other crying needs of this new and sparsely settled community, as was contended in behalf of the special legislation for Porto Rico, there might be some reason to presume Con-

gress had this end in view, but, in point of fact, it is not to be so expended, but is covered into the overflowing Treasury of the United States to lighten the burdens of other more favored peoples.

It is estimated that this extraordinary tax amounts to *more than forty dollars per capita*, in addition to the ordinary taxes of the National Government.

Under these circumstances it would seem that the rule that revenue laws should be strictly construed in favor of the tax-payer should be closely adhered to in these cases, and that if the act will bear any other construction than that contended for by the lower court, it should be given by this Court.

Leaving out the infinitesimal number of the natives, Alaska is now inhabited almost wholly by citizens of the States and other Territories. Hence, there was never any such reason for withholding from them all the protection of the Constitution which it is claimed exists as to Porto Rico and other possessions.

It would seem, therefore, that these various acts of Congress fully supply whatever may be required under the decisions in the De Lima and Downes cases, *supra*, to extend the Constitution to Alaska, and that the validity of any act of Congress applying to said Territory must be tested by that instrument.

Being so tested, sections 460 and 461 are clearly violative of its provisions and are nugatory.

Sections 460 and 461 of the Criminal Code Not Applicable.

If we are correct in our contention that the Constitution has been extended to Alaska by Congress, within the meaning of the decisions of this Court, and if we are also correct in our view that sections 460 and 461 are not in harmony with that instrument, it follows that the license tax exacted of the appellants in these cases was illegally exacted and required, and the decision of the district court of the United States for the District of Alaska must be reversed as to all of the cases involved.

But aside from the question of the constitutionality of said sections, we insist that they are not applicable to the case of the appellants, Charles Stewart, No. 139, nor to the cases of the Pacific Coast Steamship Company, Nos. 155, 156, and 157.

In these cases it is shown that the principal business of these vessels was that of a through passenger and freight business between the ports of Puget Sound and British Columbia on the one hand and Southern Alaska on the other, and that they did incidentally only a very small amount of local business, less, perhaps, than the amount of the tax, between Alaskan ports; that they were licensed, owned, and taxed at their home ports in the States of Washington and California. It is insisted, therefore, that these vessels were not "plying in Alaskan waters," within the meaning of said section, and were, therefore, not required to take out additional license and pay additional tax for the transaction of their said business.

It is to be presumed in the discussion of this act that Congress had in mind the uniform spirit in which taxation has been exercised by the United States, namely, that vessels should be taxed only once, for from the statutes themselves and from the decisions of the United States Supreme Court it has been uniformly held that a vessel enrolled, licensed, and registered under the United States navigation laws does not by engaging in business within a State become subject to its taxing power, if the owner is a non-resident.

Hayes *vs.* Steamship Co., 17 How., 596.
St. Louis *vs.* Ferry Co., 11 Wall., 423.
Morgan *vs.* Parham, 16 Wall., 471.
Gloucester Ferry Co. *vs.* Penn., 114 U. S., 196.
Pullman Car Co. *vs.* Penn., 141 U. S., 32.

Section 2793 of the Revised Statutes is as follows:

"Enrolled or licensed vessels engaged in the foreign and coasting trade on the northern, northeastern, and northwestern frontiers of the United States, departing from or arriving at a port in one district to or from a port in another district, and also touching at intermediate foreign ports, shall not thereby become liable to the payment of entry and clearance fees *or tonnage tax*, as if from or to foreign ports, but such a vessel shall notwithstanding be required to enter and clear."

Section 4220 Id.:

"No vessel belonging to any citizen of the United States, trading from one port within the United States to another port within the

> United States, or employed in the bank, whale, or other fisheries, shall be subject to tonnage tax or duty if such vessel be licensed, registered, or enrolled."

It must be presumed that all subsequent legislation on this subject was made in the light of prior legislation, and that Congress did not intend to repeal by implication either the letter or spirit of these two sections, which clearly lay down the rule that a tonnage tax is looked upon with disfavor, and if by any reasonable construction of the act in question it can be made to keep within the spirit of Congress and the spirit of the decisions of this Court, that construction should be followed, which is, the act should be so construed as to make it apply only to vessels doing an *exclusively local business* within the District of Alaska.

This act was evidently designed to require property which had heretofore paid no tax to contribute under the act in question to the General Government of the United States, so as to reimburse it to some extent for the expenses which it incurs within the District of Alaska, and not to levy a tax upon property which was taxed elsewhere in the United States, nor upon vessels which incidentally do a local business within the District, for if this had been the intention of Congress, they would have provided that ocean and coastwise vessels doing a local business for hire in Alaskan waters should be taxed $1 per ton on net tonnage, custom-house measurement of each vessel, and would have omitted the words "plying in Alaskan waters."

But it may be argued that a license is distinguished from a tax, and that the sections referring to the new revenue laws are inapplicable. The term "revenue law," when used in connection with the jurisdiction of the courts of the United States, means a law imposing duties on imports or tonnage, or a law providing in terms for revenue—that is to say, a law which is directly traceable to the power granted to Congress by section 8, of article I, of the Constitution, "To lay and collect taxes, duties, imposts, and excises." (U. S. *vs.* Hill, 123 U. S., 685.) But it is settled in the License Cases. (5 Wall., 471.)

That the granting of a license must be regarded as nothing more than a mere form of *imposing a tax*, and as implying nothing except that a licensee shall be subject to no penalty under the national law if he pays it, and all prohibitions under penalties against carrying on a business without a license are only a mode of enforcing the payment of such taxes.

The rule for the construction of statutes levying taxes or duties on a citizen is laid down very clearly in Rice *et al. vs.* U. S., 53 Fed., 912, where it is said:

> "The rule for the construction of statutes levying taxes or duties on the citizen is laid down by Lord Cairns, in delivering the judgment of the House of Lords (Partington *vs.* Attorney General, L. R., 4 H. L., 100, 122), in this language: 'As I understand the principle of all fiscal legislation, it is this: If the person sought to be taxed comes within the letter of

the law, he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible in any statute what is called an 'equitable construction,' certainly such construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute.' Judge Story says: 'It is a general rule in the interpretation of all statutes levying taxes or duties upon subjects or citizens, not to extend their provisions by implication beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out, although standing upon a close analogy. In every case, therefore, of doubt, such statutes are construed most strongly against the Government and in favor of the subjects or citizens, because burdens are not to be imposed nor presumed to be imposed beyond what the statutes expressly and clearly import. Revenue statutes are in no just sense either remedial laws or laws founded upon any permanent public policy, and, therefore, are not to be liberally construed.' (U. S. *vs.* Wiggleworth, 2 Story, 369.) And this is the uniform doctrine of the authorities. (American Net & Twine Co. *vs.* Worthington, 141 U. S., 474; U. S. *vs.* Isham, 17 Wall., 496; Hartranft *vs.* Wiegmann, 121 U. S., 609; Powers *vs.* Barney, 5 Blatch., 202; Dean *vs*, Charlton, 27 Wis., 526; Sutherland Statutory Construction, 461, 462; Cooley Taxation, 2d ed., 266.")

We think we have already shown, from the discussion of the act in question, that it was not intended to impose the license tax provided in the act upon vessels duly licensed in the coastwise trade, and it cannot be denied that the vessels of the Pacific Coast Steamship Company and the Washington and Alaska Steamship Company are so licensed.

These companies are operating a number of vessels on the Alaska route, and may from time to time be required to substitute other vessels in place of those licensed under the act. The total revenue derived from local business would not be equal to the amount of the prescribed tax, if paid. Therefore, considering the very large rate of the tax, and the fact that it was computed on the *total tonnage* of the vessel, it does not seem possible that it was intended by the statute that it should be applicable to vessels whose main business was not local trade, but that it was intended to be applicable to vessels exclusively engaged in local trade. The local trade of the vessels of The Pacific Coast Company, and The Washington and Alaska Company in Alaska is merely incidental to their through business. The rate of tonnage tax imposed by this statute is remarkably large. The tonnage tax imposed by the Revised Statutes upon vessels of the United States engaged in foreign trade is only thirty cents per ton, payable but once in a year, and the only tonnage dues on the foreign trade that amount to one dollar a ton are on foreign vessels from foreign ports here. United States vessels are not usually allowed to trade. (See Rev. Stats.,

secs. 4219, 4223.) The rates or dues fixed by these sections have been substantially reduced by the Act of June 19, 1886, chapter 421, section 11.

If the license fee is applicable to vessels trading from points outside of Alaska, it is contrary to the general plan and spirit of congressional legislation with regard to the coasting trade. The legislation relating to this trade has always attempted to permit such trade for the benefit of American vessels, foreign vessels being excluded from such trade, and American vessels engaging in it not being subject to tonnage dues.

The vessels of these companies have their home ports in the United States outside of the limits of Alaska. They are enrolled at these other ports, and may, under the provisions of the genenral legislation of Congress on the subject, obtain yearly licenses for the coasting trade, and as they have procured such licenses, they will upon the expiration of the same be entitled under the provisions of that legislation to obtain further licenses for the same purpose. These licenses expressly authorize them to engage in the coasting trade between any points of the United States. That such a license is an express authority from the United States to engage in such a trade, was settled in the early and important case of Gibbons *vs.* Ogden, 9 Wheaton, 1, in which, at pages 212, 215, Chief Justice Marshall says:

> "It seems very clear that the whole act on the subject of the coasting trade, according to those principles which govern the construction of statutes, implies unequivocably an

authority to license vessels to carry on the coasting trade. * * * The fourth section directs the proper officer to grant to a vessel qualified to receive it a license for carrying on a coasting trade, and prescribes its form, after reciting the compliance of the applicant with the previous requisites of the law. The operative words of the instrument are: 'License is hereby granted for said steamboat "Bellona" to be employed in carrying on the coasting trade for one year from the date hereof, and no longer.' These are not the words of the officer; they are the words of the legislature, and convey as explicitly the authority the act intended to give, and operate as effectually as if they had been inserted in any other part of the act than the license itself. * * * The license must be understood to be what it purports to be, a legislative authority to the steamboat "Bellona" to be employed in carrying on the coasting trade for one year from its date. It has been denied that these words authorize a voyage from New Jersey to New York. It is true that no ports are specified, but it is equally true that the words used are perfectly intelligible, and do convey such authority as unquestionably as if the ports had been mentioned. The coasting trade is a term well understood. The laws define it, and all know its meaning. * * * The object of the license, then, cannot be to ascertain the character of the vessel, but to do what it professes to do—that is, to give permission for a vessel already proved by her enrollment to be American to carry on the coasting trade."

And in Hermon *vs.* City of Chicago, 147 U. S., 396, Mr. Justice Field says, at page 465:

> "In Gibbons *vs.* Ogden (9 Wh., 210), this Court held that vessels enrolled and licensed pursuant to the laws of the United States, as these tugs were, had conferred upon them as full and complete authority to carry on this trade as it was in the power of the courts to confer."

The present section of the Revised Statutes repeating the provision referred to in 9 Wh. is section 4321. That trade with Alaska is within the meaning of the term "coasting trade" is conclusively established by section 4358 of the Revised Statutes. Under this general legislation, then, these vessels hold licenses from the United States at their home ports, giving them complete authority to engage in the coasting trade in any port of the coasts of the United States, including Alaska, and on the expiration of any such license they will be again entitled at their home ports to obtain new licenses to the same effect. The provisions of the local penal law of Alaska will not operate to prevent that right.

In the case of Huus *vs.* New York and Porto Rico Steamship Company, decided by this Court at the last term, the question involved was whether a steamship duly enrolled and licensed for the coasting trade under the laws of the United States, engaged in trade between the ports of Porto Rico and the port of New York, is a coastwise seagoing vessel within the meaning of the Revised Statutes,

section 4401, and whether when under control of a pilot licensed under the Federal statutes, is exempt under section 4444 from the provisions of State pilotage laws. Both questions were decided in the affirmative.

It was held that the Foraker Act having provided for nationalizing Porto Rican vessels, also provided that "the coasting trade between Porto Rico and the United States shall be regulated in accordance with the provisions of law applicable to such trade between any two great coasting districts of the United States." That in accordance with such provisions the executive officers of the Government issued an enrollment and license to the "Ponce," to be employed in carrying on the coasting trade, instead of treating her as a vessel engaged in foreign trade.

It is then said:

> "That the words 'coasting trade' are not intended to be strictly limited to trade between adjoining districts is also evident from Revised Statutes, 4358, wherein it is enacted that 'the coasting trade between the territory ceded to the United States by the Emperor of Russia, and any other portion of the United States, shall be regulated in accordance with the provisions of law applicable to such trade between any two great districts.'"

It is also pointed out that a similar provision was adopted in the act to provide a government for the Territory of Hawaii (31 Stat., 141, sec. 98).

If, then, because the "Ponce" was "a vessel duly enrolled and licensed to carry on the coasting

trade," she was exempt from the State pilotage laws, why should not appellant's vessels, which have been similarly enrolled and licensed, and which are likewise engaged in the coasting trade, be exempt from the necessity of obtaining an additional local license and the payment of an additional tax when they do business between California and Washington ports and the ports of Alaska? It would seem the same rule should apply to them.

In any interpretation of the statute in question, it must be remembered that it is a penal statute, subject to the elementary rule of construction that all penal statutes must be most strictly construed and extended to make criminal only those things which are necessarily included by them. This provision is a part of the penal criminal code of the District of Alaska. If we turn to the exact phraseology and form of the statutory provision in question to ascertain whether it necessarily applies to such incidental local business as is done by these companies and others whose business consists substantially of through shipping, we notice in the first place that while in the final form which section 460 has taken, by reason of the scheme of arranging the items in alphabetical order, the one beginning "freight and passenger transportation lines," has become separated from the one particularly in point, beginning "ships and shipping." These two clauses are evidently to be taken in connection with one another.

If we place them together, they read:

> "Freight and passenger transportation lines propelled by mechanical power on inland waters, one dollar per ton per annum on net tonnage, custom-house measurement of each vessel."
>
> "*Ships and Shipping.*—Ocean and coastwise vessels doing local business for hire, plying in Alaskan waters, one dollar per ton per annum on net tonnage, custom-house measurement of each vessel."

This juxtaposition makes it evident that the words "ocean and coastwise vessels" are used in contradistinction to the words "lines on inland waters." In other words, the words "ocean and coastwise vessels" are used as descriptive of the place or owner of the business done in Alaska, and not as descriptive of the vessels or place from which they come. The terms "vessels from foreign ports" and "vessels engaged in the coasting trade," which are in Congressional legislation regularly used to designate those classes of vessels, are apparently purposely avoided here.

The words "plying in Alaskan waters" are of great significance, as indicating that only vessels whose business was confined to such waters were intended to be so taxed. If otherwise, the section would be quite as complete, definite, and clear without these words, for the whole of section 460 is, by the introductory clause, one applicable only to one prosecuting the business named within the District of Alaska.

No ship not landing in Alaska would in any case be within the reach of this clause. The words "plying in Alaskan waters" must, therefore, have been inserted with the idea that it in some way limited the class of vessels to which the act applied. The introductory clause, "prosecuting or attempting to prosecute any of the following lines of business within the District of Alaska," and the clause in question, "doing local business," and "plying in Alaskan waters," are consistent in their apparent intention to limit the act in its operation to those vessels which are devoted to that local business. No other interpretation is consistent with the selection of the expressions used in the statute. The fact that the total tonnage of the vessel is selected as the basis upon which the license fee is to be computed shows conclusively that it should be applied only to those vessels whose total tonnage is engaged in the local business. It was certainly never intended by Congress that a vessel engaged in the coasting trade with a tonnage of fifteen hundred tons, for instance, only fifty of which were devoted to the local trade, should be compelled to pay a license tax on a tonnage of fifteen hundred tons. The interpretation which would make the act applicable to vessels engaged in business like that of The Pacific Coast and Washington and Alaska Companies would be prohibitive upon their local business, and injurious not only to their interests, but to the interests of the people who use their service and would be deprived of it. It is not, therefore, to be supposed for an instant that Congress intended to impose such a burden upon

the commerce of Alaska as would practically prohibit coasting vessels from doing a local business within its borders and greatly curtail the limited facilities which the people of this section already have in carrying on their commerce.

It is important to notice that all the business enumerated and required to be licensed under section 460, unless it be ships and shipping, are confessedly carried on within the District of Alaska, and said section speaks of any person or corporation prosecuting or attempting to prosecute any of the following *lines* of business *within the District of Alaska*, meaning by "lines of business" a business as a whole, and not an incidental touching at the ports within the District of Alaska and doing incidentally a local business. Having said in the same section that freight and transportation lines propelled by mechanical power on inland waters should pay one dollar per ton on the net tonnage, it also provided that ocean and coastwise vessels who established a line for local business within the District of Alaska should be subject to the tax, and not otherwise. Breweries under this act are taxed $500 per annum, and this unquestionably refers to a brewery located within the District of Alaska, and it might as logically be argued that a brewery located in the State of Washington, shipping five hundred kegs of beer within the District of Alaska, should be compelled to pay a license of $500 per annum for that privilege, as that a steamship engaged in the coastwise trade, which incidentally does a local business within the District of Alaska, should have its total tonnage subjected

to the tax therein provided. If it had been intended to tax ocean and coastwise vessels doing incidentally a local business in Alaskan waters one dollar a ton upon their total tonnage, different language would have been used.

Section 460 having provided that the tax should be levied in the nature of a license upon the doing of a line of business therein mentioned within the District of Alaska shows that the business must be carried on exclusively within that District. Within "means the limits or compass of, *not beyond*, not later than, in the inner part."

Vol. 29 Am. & Eng. Encyc. of Law, p. 521.

The Petitions of Appellants.

The only question remaining applies to the manner of presenting the questions involved to the lower court. We apprehend this Court will not be very technical in its consideration of the best method of presenting to the court authorized by the Act of 1899, to grant the license in question, the question of the constitutionality of sections 460 and 461; or the question whether if constitutional, they apply to vessels in the coastwise trade, which have been registered and taxed in their home ports in the States.

All parties were anxious to have these questions settled by this Court, and yet, being a penal statute, with unusually severe penalities attached for its violation, it would have been ruinous for them to have deliberately violated its provisions, even for the sole purpose of testing its validity or applicability. In that situation, some of the appel-

lants, filed petitions, in the nature of protests against being required to pay the license tax exacted, for both the above stated reasons, but, at the same time paid into court the amount of the license, and asked that the court determine these questions, and that the said sums so paid into court be held by it until the final determination of the matter.

In other cases, certain of the stockholders filed bills praying for injunctions against the officers of their corporations or companies, restraining them from paying out the trust funds in their hands for this illegal license tax.

The court overruled all of these bills, petitions, and protests, and refused to hold the monies so paid in, but ordered and directed that they be covered into the Treasury of the United States. It seems to us that either method was sufficient to present the questions to this Court on appeal.

A court of equity will not enjoin the payment of a tax unless the party seeking the injunction first pays or tenders the tax.

High on Injunction section 496.

It follows that these parties were required to pay into court, or tender the amount of the license tax, which they did.

In connection with this, they protested against the legality of the tax and asked for the judgment of the court, which was required to issue the license, as to their liability to pay the same. And, from his decision that they were so liable, these appeals are taken.

If the citizen who is burdened with this taxation cannot question its validity in some legal or equitable proceeding, then the law itself is unconstitutional, because it is depriving him of his property without due process of law. How, then, is this question to be determined if not in the proceeding now presented to the Court? It is impossible to enjoin the General Government from collecting this license tax, because there is no provision of law authorizing an injunction against the United States. It is likewise impossible to sue the Government of the United States in the district court for the District of Alaska to recover back the license tax paid under the provisions of this act, and no suit can be maintained in the Court of Claims against the Government upon any such claim, because no provision is made for the prosecution of any such claim before that court, hence it necessarily follows that this is the only way in which this question may be tested. As before remarked, it was certainly not the intention of Congress that one prosecuting a lawful business defined in the statute should submit himself to criminal process to test the legality of the act in question.

> "It is presumed that the legislature never intends to do injustice. If the statute is doubtful or ambiguous, or fairly open to more than one construction, that construction should be adopted which will avoid this result."
>
> Black on Interpretation of Statutes, p. 100.

> "Proceedings for the collection of the public revenue do not always require the intervention of a court or a jury, provided the property

owner is afforded an adequate opportunity to test the legality of the demand made upon his estate."

Black's Constitutional Law, p. 485, sec. 213.

The author, on page 486, says:

> "But still it is not competent for the legislature to proceed to final and absolute divesture of title without affording the tax-payer an opportunity to be heard in opposition to it. 'Due process of law' requires that he shall have a chance to interpose objections to the validity of the tax, or to the contention that his land is liable for it, or to the manner of assessing it or collecting it at some stage of the proceedings before his property is irrevocably gone and before some authority competent to afford relief in case of invalidity or injustice."
>
> Kelly *vs.* Pittsburgh, 104 U. S., 78.
>
> Hagel *vs.* Reclamation Dist., 111 U. S., 701.

If it should be conceded that the court in this matter acts simply in a quasi-judicial capacity, such as boards of equalization, etc., yet in such a capacity the citizen is entitled to raise all the points with reference to the validity of the act under the authorities above cited, and if he were not allowed to do so, he is deprived of his property without due process of law, and the very fact that Congress has failed to point out how these questions may be tested, is the very strongest argument that they should be tested in the way such matters are tested by a court upon which the duties are placed. It is elementary that where duties are imposed upon a tribunal and no method is laid

down or prescribed as to how these duties shall be performed, they are to be performed according to the inherent powers of the tribunal; for every statute is understood to contain by implication, if not by express words, all such provisions as may be necessary to effectuate its object and purpose, or to make effective the rights, powers, privileges, or jurisdiction which it grants, and all such collateral and subsidiary consequences as may be fairly and logically inferred from its terms.

In conclusion, we submit that, under the doctrine laid down by the Court in the De Lima and Downs cases, the Constitutional provision as to uniformity of taxation "throughout the United States" applies to Alaska; that the various acts of Congress hereinbefore pointed out prove conclusively that the Constitution has been extended to Alaska and that the validity of sections 460 and 461, of the Act of March 3, 1899, must be tested by the provisions of that instrument. That being so tested, they are clearly violative of its provisions for lack of uniformity. If such tax had been levied by Congress upon the business of any one of the States, or the other organized territories, there could be no doubt as to what this Court would hold respecting its constitutionality.

But, aside from this fatal objection to the decision of the court below, this act does not apply to the business of the appellants, the Pacific Coast Steamship Company and the Washington and Alaska Steamship Company, the vessels of both of which companies having been enrolled and licensed at their home ports of California and Washington to

engage in the coasting trade, and all of such vessels being engaged exclusively in such trade, within the meaning of the law, and as contradistinguished from vessels "plying in Alaskan waters," referred to in said Act of March 3, 1899, as the vessels liable to the license tax therein prescribed. That having been so enrolled, licensed, and taxed in their home ports, under the Federal Statute, to engage in the coasting trade, it was not the intention of Congress to require an additional license tax and the act does not bear the construction put upon it by the lower court.

We submit that said decision of the lower court should be in all things reversed.

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